Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	WC Docket No. 05-276

COMMENTS OF SBC COMMUNICATIONS INC.

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INTRODUCTION AND SUMMARY

I. VarTec's Petition for Declaratory Ruling is yet another attempt to avoid payment of access charges on IP-in-the-middle traffic in clear violation of this Commission's rules. As SBC explained in its recently filed IP-in-the-Middle Enforcement Petition,[1] despite the Commission's highly publicized April 2004 ruling that ordinary long-distance calls routed using IP are subject to access charges,[2] numerous providers continue to operate in defiance of that ruling by avoiding millions of dollars every month in access charges due on IP-in-the-middle calls. SBC further demonstrated that wholesale IP-based transmission providers – such as Unipoint Enhanced Services, Inc. d/b/a PointOne ("PointOne") – are liable for access charges when they route ordinary long-distance calls using IP-in-the-middle technology. In response to Vartec's petition, SBC now makes clear that interexchange carriers such as VarTec – *i.e.*, retail long-distance providers that deliver traffic to the wholesale IP-based transmission providers at issue in SBC's petition – are likewise liable for access charges on calls routed using IP-in-the-middle technology, where they know (or should know) that access charges are being avoided.

VarTec's claim to the contrary is based on the contention that, under the terms of an SBC ILEC access tariff (that of Southwestern Bell Telephone, L.P. ("Southwestern Bell")), VarTec cannot be liable for access charges except where it "subscribes" to that service and specifies the access arrangement it desires. VarTec thus appears to be of the view that, because its routing arrangements *circumvent* the ordering provisions in the tariff, it is entitled to obtain the access service covered by that tariff without payment of the applicable charges. The *AT&T Order*,

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[1] *See* Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges, WC Docket No. 05-276 (corrected version filed Sept. 21, 2005) ("SBC IP-in-the-Middle Enforcement Petition").

[2] *See* Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*AT&T Order*").

however, rejected that implausible result, explaining that, where "multiple service providers are involved in providing IP transport" on long-distance calls that originate and terminate on the public switched telephone network ("PSTN"), "the interexchange carrier is obligated to pay terminating access charges." *AT&T Order* ¶ 19.

The *AT&T Order*'s ruling on this point, moreover, is confirmed by the constructive ordering doctrine. Under that established doctrine, a carrier is subject to access charges, irrespective of whether it has ordered service in the manner dictated by the tariff, if the carrier (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services. Here, VarTec – like other interexchange carriers that rely on IP-based wholesale transmission providers – is interconnected with those providers in such a manner to ensure that its calls will be terminated to the PSTN. In addition, far from taking "reasonable steps" to prevent the receipt of access services, VarTec has affirmatively contracted for that result, and its calls have in fact been terminated to the PSTN. The constructive ordering doctrine accordingly applies here, thus confirming that VarTec is liable for the tariffed charges that apply to the access services it has received.

Any other result would also violate the filed tariff doctrine. If VarTec is correct – *i.e.*, if an interexchange carrier can evade access charges by routing calls through intermediary, IP-based providers – it would flout "the policy of nondiscriminatory rates" that is at the core of that doctrine. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). The Commission emphasized this very concern in the *AT&T Order*, explaining that the application of access charges to IP-in-the-middle calls handled by multiple carriers was necessary to ensure that AT&T was not "place[d] . . . at a competitive disadvantage" and to "remedy the current situation

in which some carriers may be paying access charges for these services while others are not." *AT&T Order* ¶ 19.

Finally, SBC's position here – that VarTec and other providers that rely on wholesale IP-based transmission providers are liable for access charges – is entirely consistent with the position that the IP-based transmission providers themselves are likewise liable for access charges. SBC is *not* seeking double recovery. Rather, the principle here is one of joint and several liability, which the Supreme Court has held applies in the tariff context. Where a retail interexchange carrier such as VarTec hands off an ordinary long-distance call to a wholesale IP-based provider such as PointOne – with the result of terminating that call to the PSTN without payment of the applicable access charges in violation of the Commission's rules – the retail and wholesale providers are jointly causing a single indivisible harm. Under black-letter law, they are accordingly jointly and severally responsible for the damages that result.

II. VarTec's additional claim – that it is entitled to "transiting" compensation from the ILEC when the traffic it misroutes through IP-based providers is intra-MTA, CMRS-originated traffic – should be rejected. As far as SBC is aware, no carrier has ever sought to collect such compensation or otherwise raised this novel claim. There is therefore no live controversy on this issue, and no reason to delay the Commission's consideration of the other important issues in this docket while the Commission addresses it.

In any case, VarTec's contention rests on the misplaced assumption that transiting carriers recover their costs from *terminating* LECs. In fact, the costs of transiting are recovered from *originating* carriers. In the transiting context, the only compensation running between the transiting carrier and the terminating carrier is for the *facilities* necessary to exchange traffic between the two carriers, which, consistent with the Commission's rules, are compensated based

on the relative volume of traffic each carrier sends to the other. Here, the very point of VarTec's illicit routing scheme is to *avoid* ordering facilities from the terminating LEC, and to route traffic instead through intermediary carriers, with the effect of evading millions of dollars in applicable access charges. Thus, even assuming that VarTec's role here is properly considered "transiting," it is entitled to nothing from the terminating LEC, regardless of the nature of the misrouted traffic. Indeed, it is outrageous to suggest, as VarTec does, that participation in an access-evasion scheme should be rewarded with *compensation* from the carrier that has been bilked out of terminating access charges.

BACKGROUND

VarTec's petition conspicuously fails to provide many of the key facts that are relevant to its claim for declaratory relief.[3] SBC has been able to learn, however, that VarTec is a large long-distance provider with annual revenues that, before its recent Chapter 11 filing, exceeded $1.5 billion.[4] VarTec claims to be a pioneer of "dial-around" long-distance calling – in which the end user dials a "10-10" number to dial around its presubscribed interexchange carrier – and it advertises long-distance rates as low as three cents per minute.[5]

VarTec was able to amass such revenues – and to charge rock-bottom rates – in part by evading terminating access charges on an enormous volume of interexchange calls. As SBC detailed in a complaint filed against VarTec in December 2004, although VarTec is a large

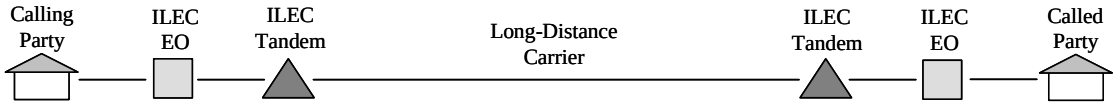
[3] *See* 47 C.F.R. § 1.41 (requests for relief "should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request").

[4] *See* Press Release, *VarTec Telecom Receives Highest Rating* (Oct. 7, 2002), *available at* http://www.vartec.com/EN/AboutUs/news_100702.asp.

[5] *See* VarTec Long Distance Service, *available at* http://www.vartec.com/EN/Products/ld/3cent.asp.

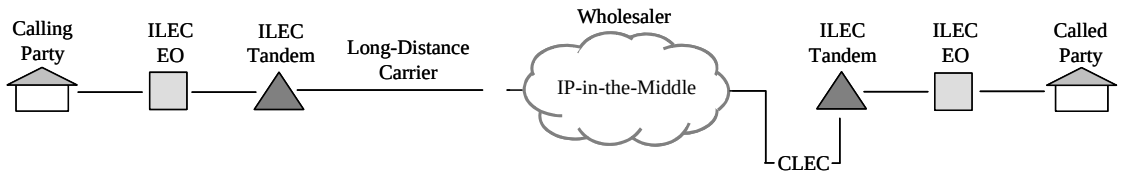
interexchange carrier with points of presence and Feature Group D terminating access arrangements throughout Southwestern Bell's region, VarTec avoided using those terminating access arrangements on a large number of interexchange calls.[6] Instead, VarTec delivered those calls to IP-based transmission providers such as PointOne and Transcom Enhanced Services, LLC ("Transcom"). These IP-in-the-middle providers, in turn, transported the calls and delivered them to competitive local exchange carriers ("CLECs"), which in turn handed them to Southwestern Bell over *local* interconnection trunks, without payment of terminating access charges (and in many cases without payment of anything at all). The following two illustrations, which are taken from the SBC IP-in-the-Middle Enforcement Petition, depict the differences between an ordinary long-distance call and the IP-in-the-middle routing scheme employed by VarTec:

Ordinary Long-Distance Call



[6] *See* First Amended Complaint ¶¶ 35-37, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. filed Dec. 17, 2004) ("First Amended Complaint"). This is the same complaint in which SBC named PointOne as a defendant, and which resulted in the primary jurisdiction referral addressed in the SBC IP-in-the-Middle Enforcement Petition. The First Amended Complaint is attached to the SBC IP-in-the-Middle Enforcement Petition as Exhibit F. Prior to the district court's primary jurisdiction referral order, the court stayed the action as to VarTec in light of VarTec's Chapter 11 filing. *See* Memorandum Opinion and Order, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. Nov. 22, 2004). In connection with VarTec's bankruptcy proceeding, SBC entered into a contingent settlement agreement pursuant to which SBC would dismiss VarTec from the Missouri litigation. *See* Stipulation and Order for Assumption and Assignment of Executory Contracts, and Related Cure, Among (I) the Debtors, (II) the SBC Telcos, (III) Comtel Telcom Assets LP, and (IV) the RTFC, *In re VarTec Telecom, Inc.*, Case No. 04-81694-saf-11 (Bankr. N.D. Tex. Aug. 22, 2005). SBC accordingly files these comments for the purpose of addressing issues that are of industry-wide significance, and not in pursuit of its pre-petition claims against VarTec.

IP-in-the-Middle Call Routed Using Wholesale Provider



Through this artifice, VarTec evaded a substantial amount of access charges. At the time SBC first filed its complaint against VarTec in the fall of 2004, SBC estimated that VarTec, in conjunction with its IP-based co-conspirators, had avoided between $19 million and $35 million in terminating access charges *from SBC alone*.[7] SBC further estimated that, by this point, VarTec was evading access charges on fully 50% of the interexchange calls it carried.[8] And, as SBC has explained, even today – more than 18 months after the Commission has supposedly acted to put an end to this charade – SBC continues to lose more than $1 million in terminating access charges *every month* to IP-in-the-middle routing schemes generally, and other local exchange carriers are presumably in the same boat.[9]

The practice of using IP to evade access charges on interexchange PSTN-to-PSTN calls is a familiar one to the Commission. As SBC has explained in detail,[10] the issue came to a head with AT&T's October 2002 petition for a declaratory ruling asking the Commission to rule that PSTN-to-PSTN calls carried using IP-in-the-middle technology were exempt from access charges.[11] In response to that petition, carriers of all stripes – including, among others,

[7] *See* First Amended Complaint ¶ 43.

[8] *See id.*

[9] *See* SBC IP-in-the-Middle Enforcement Petition at 1, Ex. D ¶ 9 (Declaration of Robert A. Dignan).

[10] *See id.* at 5-14.

[11] *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (FCC filed Oct. 18, 2002).

conventional long-distance carriers such as AT&T and MCI, IP-based transmission providers such as PointOne and Transcom, and local exchange carriers such as SBC – vigorously debated whether access charges apply to IP-in-the-middle calls. And the Commission, in a highly publicized decision issued for the express purpose of "provid[ing] clarity to the industry," ruled that IP-in-the-middle long-distance calls are "telecommunications services" subject to access charges. *AT&T Order* ¶¶ 10, 12, 14.

Critically, moreover, the "clarity" the Commission provided on this issue applied by its terms regardless of whether an IP-in-the-middle call was transported by a single provider (as described in AT&T's petition) or by multiple providers (as where VarTec hands the call to PointOne or Transcom). As SBC has explained, in the course of the AT&T proceeding, PointOne and Transcom aggressively advocated that their services were (or at least should be) exempt from access charges, and, when it became clear that the Commission was likely to reject AT&T's petition, they specifically asked the Commission to confine its ruling to AT&T.[12] Wiltel, by contrast, asked the Commission to address several distinct scenarios, including (1) where, as in the case of AT&T, "a single interexchange carrier (IXC)" using IP-in-the-middle "carries a call all the way from the originating end-user's local exchange carrier (LEC) to the called end-user's LEC"; and (2) where, as here, "two or more carriers collaborate to perform the same functions" as the single carrier in the first scenario, and "one or more of the carriers . . .

[12] *See* SBC IP-in-the-Middle Enforcement Petition at 11-12; *see also* Ex Parte Letter from W. Scott McCollough, Stumpf Craddock Massey & Pulman, on behalf of Transcom, to Marlene H. Dortch, FCC, WC Docket No. 02-361 (FCC filed Sept. 23, 2003); Ex Parte Letter from Dana Frix, Chadbourne & Parke LLP, on behalf of PointOne, to Marlene H. Dortch, FCC, WC Docket No. 02-361 (FCC filed Jan. 8, 2004). *But see* Ex Parte Letter from David L. Lawson, on behalf of AT&T Corp. to Marlene H. Dortch, FCC, WC Docket No. 02-361, at 1, 4 (FCC filed Apr. 13, 2004) (explaining that AT&T's IP-in-the-middle service was "identical" to those offered by PointOne and Transcom, and that any FCC ruling to the contrary would constitute "patently unlawful" Commission favoritism).

(correctly or incorrectly) holds itself out as an 'Enhanced Service Provider'" rather than an interexchange carrier.[13]

The Commission did as Wiltel asked. In addition to ruling generally that the use of IP does not exempt an ordinary interexchange call from access charges, the Commission – with direct citation to Wiltel's request – explained how that ruling applied where "multiple service providers are involved in providing IP transport." *AT&T Order* ¶ 19. The Commission stressed that "*all* telecommunications services are subject to our existing rules," and it held that, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." *Id.* (emphasis added). The Commission observed that this approach was necessary to ensure that AT&T was not "place[d] . . . at a competitive disadvantage" and to "remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.* The Commission further stated that ILECs should "file any claims for recovery of unpaid access charge in state or federal courts, as appropriate." *Id.* ¶ 23 n.93.

No party appealed the *AT&T Order*. Nevertheless, in the wake of that ruling, several carriers, VarTec among them, continued to route calls through IP-based transmission providers such as PointOne and Transcom, and to contend that, as a result, they were not liable for access charges. Accordingly, in the fall of 2004, SBC initiated a lawsuit against various providers in the United States District Court for the Eastern District of Missouri alleging breach of federal

[13] Letter from David L. Sieradzki, counsel for WilTel, to Marlene H. Dortch, FCC, WC Docket No. 02-361, Attach. at 1-2 (FCC filed Mar. 12, 2004). In describing this latter scenario, WilTel specifically identified PointOne and Transcom as entities claiming to be ESPs and seeking to avoid the payment of access charges on IP-in-the-middle calls. *See id.*, Attach. at 2; SBC IP-in-the-Middle Enforcement Petition at 12.

and state tariffs and other claims, and seeking money damages and permanent injunctive relief for interexchange traffic delivered to SBC without payment of access charges and in violation of the *AT&T Order*.[14]

The defendants, in turn, pointed fingers at each other. On one hand, VarTec, in anticipation of the filing of SBC's lawsuit, filed the instant petition seeking, among other things, a declaratory ruling that, when VarTec contracts with IP-based carriers to carry its long-distance traffic, the IP-based carriers, not VarTec itself, are responsible for access charges. The IP-based carriers, on the other hand, have claimed that they *cannot* be held liable for access charges, primarily because they (unlike VarTec and the other carriers that sell long-distance at retail) are supposedly not "interexchange carriers" for purposes of the Commission's access charge rules, *see* 47 C.F.R. § 69.5(b). In the SBC IP-in-the-Middle Enforcement Petition, SBC has explained in detail why the IP-based providers' position is wrong. In these comments, SBC addresses VarTec's petition and explains that, contrary to VarTec's claim, the mere act of handing an ordinary long-distance call to an IP-based transmission provider does not absolve an interexchange carrier from liability for the access charges that apply to that call.

DISCUSSION

I. VARTEC IS LIABLE FOR TERMINATING ACCESS CHARGES ON CALLS IT DELIVERS TO IP-IN-THE-MIDDLE TRANSPORT PROVIDERS

VarTec does not dispute that, when it delivers PSTN-to-PSTN interexchange traffic to carriers such as Transcom or PointOne, and Transcom or PointOne in turn uses IP-in-the-middle to route the traffic to an ILEC for termination, access charges apply. Nor could it. As explained above, the Commission's *AT&T Order* directly holds that where a PSTN-to-PSTN interexchange call is routed using IP, access charges apply, irrespective of whether "only one interexchange

[14] *See* First Amended Complaint.

carrier uses IP transport or instead multiple service providers" collaborate to complete the call. *AT&T Order* ¶ 19. Instead, VarTec's claim is that, when it hands off traffic to an IP-based provider such as Transcom or PointOne, *VarTec* is "not Southwestern Bell's . . . 'customer,'" and therefore *VarTec* is not the entity that is "required by [Southwestern Bell's] tariff to pay access charges." VarTec Petition at 3.

VarTec's claim is based entirely on its interpretation of Southwestern Bell's tariff. As VarTec sees it, in order to be liable under Southwestern Bell's tariff, a carrier must "subscribe" to the tariffed service, by "plac[ing] an access order with Southwestern Bell that specifies all the information necessary for Southwestern Bell to provide and bill for the requested service." *Id.* at 4 (citing Southwestern Bell FCC Tariff No. 73, § 5.2.1(B)). VarTec thus contends that, for calls it hands off to PointOne or Transcom (or, for that matter, anyone else), it has not "order[ed]" access service from Southwestern Bell and therefore cannot be held liable for the terminating access charges that it concedes are due on those calls. *See id.*

The short answer to VarTec's theory, however, is that the Commission already flatly rejected it. As explained above, the *AT&T Order* explicitly states that it applies regardless of "whether only one interexchange carrier" is involved in the transmission of the call or "instead multiple service providers are involved," and it explains that, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." *AT&T Order* ¶ 19. VarTec is plainly an "interexchange carrier," and, by its own admission (*see* VarTec Petition at 2), it contracts with "provider[s] of IP-enable voice services . . . to deliver interexchange calls." Under the *AT&T Order*, where those calls originate and terminate on the PSTN, VarTec is liable for access

charges. *See AT&T Order* ¶ 19; *see also id* ¶ 23 n.92 ("To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.").

Indeed, in the *A&T Order*, AT&T itself did not "subscribe" to the terminating LEC's tariff according to its terms, but rather routed calls through intermediary CLECs. *See id.* ¶ 11 n.49. Yet the Commission found that AT&T must pay access charges on these calls anyway. *See id.* ¶ 15. It therefore cannot be, as VarTec contends, that VarTec's evasion of the ordering provisions in Southwestern Bell's tariff excuses it from paying for the access services it has received. Based on the clear holding of the *AT&T Order*, the Commission should reject VarTec's claim.

The Commission's holding, moreover, is corroborated by the "constructive ordering" doctrine.[15] Under that established doctrine – which has been applied in the specific case of interexchange carriers seeking to avoid the rates in switched access tariffs – a regulator or court will "look[] beyond the definition of 'ordering' found in the carrier's tariff," and will hold that a carrier constructively orders services "when the receiver of services (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." *Advamtel, LLC v.*

[15] The constructive ordering doctrine originated in Memorandum Opinion and Order, *United Artists Payphone Co. v. New York Telephone Co.*, 8 FCC Rcd 5563, ¶¶ 1-2 (1993). In that case, United Artists ("UA") had installed payphones "in such a way as to allow callers to charge [long-distance] calls to UA payphone lines." *Id.* ¶ 13. The Commission found that, even though UA did not want customers to use its payphones for that purpose, if it had "failed to take steps to control unauthorized" calls, it could in theory be held liable to AT&T for those calls because "UA could reasonably be held to have constructively 'ordered' service from AT&T, thus establishing an inadvertent carrier-customer relationship." *Id.*

AT&T Corp., 118 F. Supp. 2d 680, 685 (E.D. Va. 2000).[16] The purpose of the constructive ordering doctrine is to enforce the filed-rate doctrine – *i.e.*, to "ensur[e] equal payment of the tariff rate when one receive services pursuant to a filed tariff," even where the tariffed service was not ordered. *Id.* at 686.

Advamtel is directly on point here. In *Advamtel*, a long-distance carrier (AT&T) argued that it was not obligated to pay access charges to various CLECs "because it never ordered any services pursuant to the terms specified in the tariff." *Id.* at 684. Some of the tariffs that AT&T sought to avoid were identical in key respects to those at issue here – for example, they "define[d] 'customer' as 'one who subscribes to services.'" *Id.* at 684 n.10 (citation omitted); *compare* VarTec Petition at 4 (arguing that Southwestern Bell's tariff applies only to a "'customer,'" which in turn is defined as an "entity which subscribes to the services offered under this tariff") (citation omitted). AT&T claimed that, because it had not subscribed to the services, it "ha[d] no obligation to pay for the services." *Advamtel*, 118 F. Supp. 2d at 685. The court rejected this claim under the constructive ordering doctrine. It explained that "only if the constructive ordering doctrine is applied here can massive rate discrimination be avoided . . . .

[16] *See also* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 188 (1999) ("affirmative consent was unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services"); Memorandum Opinion and Order, *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, ¶ 14 (1999) (holding AT&T liable for paying access charges to MGC even though AT&T had notified MGC that "it had neither ordered, nor consented to" MGC's access services, where AT&T continued to provide service to customers that were also served by MGC rather than notify those customers that they must switch either their local carrier or their long-distance company); *AT&T Corp. v. City of New York*, 83 F.3d 549, 555-56 (2d Cir. 1996) (holding that where prison system might not have taken enough "reasonable steps" to keep inmates from using long-distance services, material fact existed as to whether prison system "constructively ordered" long-distance service).

[I]f the doctrine is not applied, AT&T will have received millions of dollars of services for free – surely, a result antithetical to the filed-rate doctrine." *Id.* at 687.[17]

The constructive ordering doctrine refutes VarTec's claim that it is not a customer of Southwestern Bell's access services and is therefore immune from access charge liability. VarTec is "interconnected in such a manner that it can expect to receive access services" from SBC. Although VarTec has used intermediary carriers, there is an unbroken chain between VarTec and the terminating local exchange carrier, VarTec's purpose for using these intermediaries was to deliver calls to SBC's networks for termination, and the calls were terminated without paying access charges in violation of the *AT&T Order*. VarTec also "fail[ed] to take reasonable steps to prevent the receipt of access services" and "does in fact receive such services." Indeed, far from taking steps to prevent the receipt of access services, VarTec contracted with IP-enabled transmission providers such as PointOne and Transcom to deliver calls to SBC, and it reaped the benefit of the low rates these providers were able to charge by virtue of their failure to pay access charges.

Any other result, moreover, would permit VarTec to receive millions of dollars worth of tariffed services without payment of the charges established in the tariff, which would be directly contrary to the filed-rate doctrine. As the Supreme Court has explained, that doctrine creates a "duty to file rates with the Commission," and a concomitant obligation "to charge *only* those rates," and thereby to "prevent[] price discrimination." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116, 126 (1990) (emphasis added); *see also Arizona Grocery Co. v.*

[17] The court in *Advamtel* also rejected AT&T's argument that the constructive ordering doctrine violated the filed-rate doctrine because "it impermissibly permits parties to waive clear ordering provisions in the tariff." *Advamtel*, 118 F. Supp. 2d at 685. The court explained that "deviations from the filed tariff that do not result in rate discrimination are not barred by the filed-rate doctrine." *Id.* at 686. "Accordingly, the constructive ordering doctrine, rather than conflicting with the filed-rate doctrine, is fully consistent with it and its underlying policy." *Id.*

Atchison, T. & S. F. Ry., 284 U.S. 370, 384 (1932) (filing requirements "render rates definite and certain, and . . . prevent discrimination and other abuses"). As the Supreme Court has also explained, filed rates that "are subject to secret alteration" are anathema to that doctrine, as they fatally undermine its core purpose: "to establish a rate duly published, known to all, and from which neither [party] may depart." *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). Yet such "secret alteration" – *i.e.*, the evasion of tariffed rates through the use of intermediary carriers that misroute long-distance traffic – is precisely what VarTec claims it is authorized to do. That argument, if credited, "opens the door to the possibility of the very abuses of unequal rates which it was the design of the [filed-rate doctrine] to prohibit and punish." *Id.*

VarTec insists that its access-charge avoidance is excusable because it is not responsible for the actions of the IP-based providers with which VarTec contracts. VarTec, its petition asserts, "has no prior knowledge or control over what other carriers are chosen by PointOne or Transcom to deliver calls to Southwestern Bell or other terminating LECs," and VarTec "also does not know the details of how the other carriers have arranged for Southwestern Bell or other terminating LECs to terminate these calls." VarTec Petition at 2. In VarTec's view, this supposed lack of knowledge means that, while "[i]t is reasonable to require payment" of access charges from the so-called "enhanced service providers" that carry VarTec's traffic, *id.* at 5, VarTec itself should be immune from such liability.

But, even apart from the fact that the Commission already rejected this flawed reasoning in the *AT&T Order*, *see supra* pp. 10-11; *AT&T Order* ¶ 19, VarTec's head-in-the-sand defense has no basis in law or sound policy. SBC has no quarrel with the use of legitimate means to efficiently route interexchange traffic, including the use of third party wholesale transmission providers to perform that function. At the same time, carriers that use such wholesale providers

have an obligation to do so with their eyes open. For example, where a wholesale transmission provider offers a transport and termination rate that is too good to be true, it is likely because the wholesale provider is evading access charges.[18] At least in that circumstance – *i.e.*, where the originating interexchange carrier is aware of objective evidence suggesting that the wholesale provider is evading access charges – the carrier has a good faith obligation to investigate the matter and to confirm that the wholesale provider it intends to use is paying access charges. If the originating interexchange carrier fails to do so and delivers traffic to that wholesale provider anyway, the carrier is no different than the individual who buys a deeply discounted, brand new stereo out of the trunk of a car. There, based on objective evidence, the buyer knows (or reasonably should know) that the seller is trading in illicitly obtained goods, and the buyer's claim that he "did not know the stereo was stolen" is not credible. For this same reason, VarTec's mere assertion that it "did not know" that PointOne or Transcom were evading access charges is insufficient to absolve VarTec of liability.

None of this is to say, however, that SBC (or any other terminating local exchange carrier) is entitled to *multiple* recovery when a particular call is misrouted for the purpose of evading access charges. Rather, the principle here is one of joint and several liability. For the reasons explained in the SBC IP-in-the-Middle Enforcement Petition, where multiple carriers collaborate to deliver an interexchange IP-in-the-middle call to the PSTN without payment of

[18] Despite the substantial reductions in access charges in the last several years, terminating access charges remain a substantial cost of transmitting interstate interexchange PSTN-to-PSTN calls. In Texas, for example, excluding facilities charges, SBC's average terminating access rate for interstate calls is approximately 0.8 cents a minute. The terminating access rate for intrastate calls is often higher; in Texas, for example, the average terminating intrastate access rate is approximately 3.7 cents per minute (excluding facilities charges). The rate elements that comprise SBC's terminating access charges are set out in SBC's tariffs. *See, e.g.*, Southwestern Bell Tel., L.P. Tariff FCC No. 73 § 6.9; Southwestern Bell Tel., L.P. Texas Access Service Tariff §§ 3.4, 6.9.

access charges in violation of the Commission's rules, the IP-based transmission provider (*i.e.*, PointOne and similarly situated providers) is liable for the applicable access charge. Likewise, as explained above, in that same circumstance, the carrier that delivers the call to the IP-based provider (here, VarTec) is also liable for the applicable access charge. Importantly, the harm at issue – the avoidance of the applicable access charge in violation of the Commission's rules – is a single, indivisible harm. And it is established law that, "where the acts of joint tortfeasors cause a single indivisible harm, damages are not apportioned, and each is liable in damages for the entire harm." *E.g.*, *Becker v. Poling Transp. Corp.*, 356 F.3d 381, 391 (2d Cir. 2004); *see* Restatement (Second) of Torts § 875 (1979) ("Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."). That principle – which the Supreme Court has long held applies with full force in the tariff context, *see Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 231-34 (1925) – is applicable here and makes clear that, where multiple providers misroute an interexchange PSTN-to-PSTN call and thereby evade access charges in violation of the Commission's rules, they are each jointly and severally liable for the entire harm that results.

Finally, the above discussion refutes VarTec's claims under sections 201(b) and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b), 203(c). VarTec contends that, by seeking to collect access charges from originating long-distance providers such as VarTec, Southwestern Bell is deviating from the terms of its tariff in violation of sections 201(b) and 203(c). *See* VarTec Petition at 6-8. For the reasons set forth above, SBC's efforts to collect access charges that are evaded through the use of IP-based transmission providers, far from contradicting the terms of its tariffs, is an attempt to *enforce* the tariffs and thus to ensure that all carriers pay the

same rate for terminating access services. That effort, moreover, was expressly and properly sanctioned in the *AT&T Order*. It follows that SBC's efforts to collect unpaid access charges are fully consistent with sections 201(b) and 203(c).

II. THE COMMISSION SHOULD NOT ADDRESS VARTEC'S CLAIM FOR "TRANSITING" COMPENSATION, WHICH IN ANY EVENT IS WITHOUT MERIT

Parts III and IV of VarTec's petition are directed at the contention that VarTec is entitled to compensation, supposedly as a "transiting" carrier, for intra-MTA, CMRS-originated traffic that VarTec receives from a CMRS carrier and delivers to an IP-based wholesale transmission provider, and which the IP-based provider in turn delivers (either directly or through a CLEC intermediary) to an incumbent LEC for termination. As VarTec sees it, this intra-MTA traffic is subject to reciprocal compensation, rather than access charges, under section 251(b)(5), 47 U.S.C. § 251(b)(5). Furthermore, VarTec contends that the terminating LEC in this scenario is required to pay VarTec for the "transiting" function VarTec performs, and the terminating LEC may then seek compensation from the originating CMRS carrier, in the form of reciprocal compensation payments. *See* VarTec Petition at 8-12.

As an initial matter, however, the Commission should not address these issues here. To SBC's knowledge, neither VarTec nor any other carrier has ever attempted to assess the "transiting" charges that VarTec claims are applicable here on the facts as VarTec presents them. Indeed, VarTec's novel argument for compensation appears to be little more than an effort to create a roadblock to *SBC's* attempt to recover compensation for access traffic that VarTec has misrouted through the use of wholesale IP-based transmission providers. That is to say, VarTec appears to have raised these issues so that, when faced with a demand for access-charge compensation for traffic misrouted through third-party IP-based providers, VarTec could claim an offset based on its "transiting" theory. The Commission need not and should not indulge such

behavior. Particularly in light of the fact that transiting issues are pending in the Commission's *Intercarrier Compensation* rulemaking,[19] and in the absence of any concrete controversy on the specific issue VarTec raises, the Commission should not delay resolution of the more pressing issues in this proceeding – *i.e.*, those discussed above and in the SBC IP-in-the-Middle Enforcement Petition – in order to address VarTec's transiting theory.

In any event, VarTec's "transiting" claim fails on the substance. VarTec's theory starts from the premise that intra-MTA CMRS-originated traffic is subject to reciprocal compensation, not access charges. *See* VarTec Petition at 10. That is true as far as it goes. "[T]raffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA . . . is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges."[20] And, as VarTec asserts (at 10), this principle applies regardless of whether CMRS-originated traffic is exchanged directly between the originating CMRS carrier and the terminating carrier or instead is routed over the facilities of a third-party transit provider.

VarTec also claims, however, that VarTec is entitled to charge the terminating incumbent LEC for the "transiting" service VarTec purportedly provides. VarTec bases this claim on the Commission's *Texcom* decisions,[21] in which the Commission held that an ILEC (GTE) could charge a paging provider for facilities used to deliver paging traffic that was originated by a third party and transited the ILEC's network before being delivered to the paging provider for

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[19] *See* Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶¶ 120-133 (2005) ("*Intercarrier Compensation FNPRM*").

[20] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1043 (1996) ("*Local Competition Order*") (subsequent history omitted).

[21] *See* Memorandum Opinion and Order, *Texcom, Inc. v. Bell Atlantic Corp.*, 16 FCC Rcd 21493 (2001) ("*Texcom*"); Order on Reconsideration, *Texcom, Inc. v. Bell Atlantic Corp.*, 17 FCC Rcd 6275 (2002) ("*Texcom Reconsideration Order*").

termination. As VarTec sees it, "[t]he facts presented by this petition are similar to those in the *Texcom* decisions," insofar as VarTec "transits" intra-MTA calls that "originate on the networks of third-party CMRS carriers" and "terminate on Southwestern Bell's network and the networks of other terminating LECs." VarTec Petition at 12.

VarTec's claim rests on a misunderstanding of how transiting is compensated in the ordinary course and a misreading of the *Texcom* decisions. First, in the ordinary course, the transiting carrier – which is "[t]ypically . . . an incumbent LEC" – charges *the originating carrier*, not, as VarTec appears to believe, the terminating carrier, for the provision of transiting services.[22] Indeed, in the transiting context, the only compensation between the transiting carrier and the terminating carrier is for the *facilities* used to connect the two networks. Under the Commission's rules, those facilities are compensated on a pro rata basis – with two-way facilities paid for according to the proportion of traffic each party sends to the other. *See* 47 C.F.R. § 51.709(b) ("The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.").

Accordingly, in the ordinary course, even assuming that VarTec is properly considered a "transiting" carrier when it delivers intra-MTA, CMRS-originated traffic to an IP-in-the-middle provider, VarTec is not entitled to compensation from the terminating LEC. In that circumstance, VarTec, depending on its arrangement with the originating CMRS provider, may

[22] *Intercarrier Compensation FNPRM* ¶ 120; *see* Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, ¶¶ 115-117, 120 (WCB 2002).

be entitled to charge *that* provider a "transiting" fee. Likewise, VarTec may, depending on its arrangement with the IP-based transmission provider, be entitled to compensation for the facilities necessary to deliver traffic to that provider. But in no event is VarTec entitled to levy a transiting charge on the terminating LEC, which receives the call (directly or indirectly) from the IP-based provider and delivers it to the called party.

Contrary to VarTec's claim, the *Texcom* decisions do not alter this general rule. *Texcom*, like the *TSR Wireless* decision on which it was based,[23] involved unique questions that arise in applying the Commission's intercarrier compensation rules in the paging context. As a general matter, the Commission's reciprocal compensation rules foreclose an originating LEC from "assess[ing] charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). In *TSR Wireless*, the Commission applied that rule to the paging context. Various LECs had argued that, by definition, the Commission's reciprocal compensation rules, including Rule 703(b), applied only where the traffic was truly *reciprocal – i.e.*, where the carriers exchange traffic that originates on one another's networks – and not, as in the one-way paging context, where one of the carriers only *receives* traffic. The Commission rejected that argument. It held that, under Rule 703(b), where an originating LEC delivers traffic bound for a paging carrier that originates on the LEC's network, the originating LEC may *not* charge the paging carrier for terminating the call to the paging carrier. *TSR Wireless Order* ¶¶ 18-26.

At the same time, however, the Commission explained that Rule 703(b) applies only to LEC-originated traffic, and not to "'transiting' traffic, that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the

[23] *See* Memorandum Opinion and Order, *TSR Wireless, LLC v. U S West Communications, Inc.*, 15 FCC Rcd 11166, ¶¶ 20-21 (2000) ("*TSR Wireless Order*").

paging carrier's network." *Id.* ¶ 19 n.70. Furthermore, the Commission explained that, in that context, the "paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points on the paging carrier's side of the point of interconnection." *Id.* It is this latter aspect of the *TSR Wireless Order* that the Commission applied in *Texcom* to reject a paging carrier's complaint that the transiting LEC had improperly charged the paging carrier for the full portion of the facilities used to carry paging traffic originating on the network of a third party. *See Texcom* ¶ 4; *Texcom Reconsideration Order* ¶¶ 3-6.

Under *TSR Wireless* and *Texcom*, a transiting LEC is thus entitled to charge the terminating paging carrier "*for facilities ordered from the LEC*" that are necessary to deliver calls to the paging carrier for termination. *TSR Wireless Order* ¶ 19 n.70 (emphasis added). Here, the terminating LEC is not ordering *anything* from VarTec; rather, it is using its local exchange switching facilities to terminate traffic that VarTec has routed to the ILEC via intermediary carriers. And *Texcom* says nothing about the general practice, noted above, pursuant to which the transiting carrier charges the *originating* carrier for the costs of transiting traffic across the network. *Texcom* thus does not alter the conclusion that, even assuming that VarTec's role here is properly considered that of a "transiting carrier," VarTec can seek compensation for that role, not from the terminating LEC, but rather, at most, from the originating carrier and from the entity to which it delivers the traffic.

VarTec's transiting theory, moreover, fails for another reason. As VarTec notes, in a true transiting scenario, the terminating carrier may be entitled to seek compensation from the originating carrier pursuant to section 251(b)(5). *See* VarTec Petition at 12. The very purpose of the IP-in-the-middle routing scheme at issue here, however, is to evade detection and to avoid providing the information that is necessary to ensure that calls are properly compensated.

Indeed, in many cases, SBC receives IP-in-the-middle long-distance calls with call data that has been manipulated or stripped. The apparent purpose of this behavior is to prevent detection and thereby to avoid access charges. It is outrageous to suggest, as VarTec does, that the terminating LEC – which is the entity that is directly harmed by this illicit conduct – should be required to *compensate VarTec* for its role in such a scheme. Instead, consistent with the principles discussed above and in the SBC IP-in-the-Middle Enforcement Petition, the terminating LECs must be made whole, by holding the long-distance carriers and IP-based providers that participate in this unlawful behavior jointly and severally liable for the access charges they have evaded.

CONCLUSION

The Commission should confirm that interexchange carriers can be liable for access charges when they deliver ordinary long-distance calls to IP-based transmission providers which, in turn, terminate those calls (directly or indirectly) without payment of the applicable access charges in violation of the Commission's rules. In addition, the Commission should reject the claim that the interexchange carrier in this scenario is entitled to compensation as a "transiting" carrier when the calls in question are CMRS-originated, intra-MTA calls.

Respectfully submitted,

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